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HOLDING A FEDERAL COURT OUTSIDE THE DISTRICT.

United States District Judge Bledsoe, of Los Angeles, by press reports is said to have held "court" on a Southern Pacific limited which left San Francisco Jan. 4th, 1917, bound for New York City. Attorneys were permitted, it is reported, to argue questions concerning the admissibility of certain evidence in the so-called fraud suits in which the United States is seeking to cancel patents on California oil lands acquired by the Southern Pacific Company. For the convenience of witnesses, Judge Bledsoe also consented, it is said, to hold "court" in New York City.

The action of Judge Bledsoe is hardly open to the criticism, implied in these reports, that he was attempting to hold a "special term" of his court outside of his district in violation of Section 11 of the Judicial Code, which requires all "special terms" of federal courts to be held "in the same place where any regular term is held, or at such other place *in the district* as the nature of the business may require.

The hearing of arguments or the taking of testimony on a train or anywhere else is not the holding of court; it is to be regarded more as a hearing in chambers by the judge himself who in such cases may suit the convenience of counsel. (Butler v. United States, 87 Fed. Rep. 655.) The case just cited, however, makes it clear that every order or ruling, interlocutory or otherwise, whether made in chambers or in open court, is the order of the court and not of the judge, and therefore could not be made outside of the district.

The celebrated Tally Impeachment Trial illustrates this distinction. In this case the Supreme Court of Alabama, with consent of counsel, adjourned a hearing away from Montgomery, the capital of the state, to Huntsville, for the purpose of taking testimony. In justifying its action, the court said: "We were not unmindful of Section 3, Article 4, of the Constitution, which is in this language: 'The Supreme Court shall be held at the seat of government;' and we were careful, while sitting at Huntsville as individual members of the court and not as the court itself, to avoid the attempted exercise of all judicial power. Hence it is that we made no rulings as to the admissibility of testimony except of a tentative and advisory nature, and hence it is also that much incompetent testimony was received subject to objections noted at the time, and is now to be stricken out and excluded, either expressly or by tacitly disregarding it in reaching the conclusions we shall announce." (State ex rel. v. Tally, 102 Ala. 25.)

QUALIFIED PRIVILEGE OF ONE SERVANT TO USE SLANDEROUS WORDS OF ANOTHER SERVANT.

The question whether a corporation is liable for oral slander by its servants as for other torts, though it may be held for a malicious libel, is considered by Supreme Court of Tennessee in Southern Ice Co. v. Black, 189 S. W. 861. And conceding that there may be liability for oral slander the circumstance that the supposed slander was made in the inquiry into a transaction, which the author had a duty to investigate, the question of qualified privilege *vel non* is considered.

The facts show that the words were uttered only to the plaintiff in the presence of other servants all interested in the disappearance of a book with coupon tickets for ice alleged to have been stolen. The question as to who stole the book lay between two servants, and the corporation's manager being convinced that plaintiff was the culprit used the words of which complaint was made.

The court said: "We do not think speaking the slanderous words would fall reason-

ably within the contemplation of the parties when they made the contract of employment, either that the master impliedly authorized the foreman to speak the words or that he so agreed to indemnify his other servant against such conduct. It is not like the master's implied agreement to furnish a safe place to work, safe machinery and the like for which he must respond in damages if he fails in such duty. These duties are parts of the contract of employment, though unexpressed, and are said to be absolute. But the speaking of slanderous words is so often the result of an outbreak of temper and is always an expression of opinion, that it usually is disconnected from the servant's duties and can reasonably be said to be an unexpressed part of the contract of employment. Hence Gardner's opinion that Black got the coupon book and is a thief and a liar, being unauthorized is no ground of action against the common employer." And the court said that it thought the speaking of them was qualified privilege.

The court also was of the opinion that this reasoning "does not apply to a third party to whom the master owes a special duty. It does not apply to the case of a passenger on a public conveyance nor to a customer invited on the premises of the owner, nor to any other one to whom the master actually or impliedly owes a special duty."

While it may be true that there is a well-founded distinction between slanderous words written and those spoken by the servants of a principal, whether corporate or individual, as to liability of the latter therefor, as many cases hold, yet this case holds they are on the same footing, or the question of qualified privilege would not have been considered at all.

This plea of privilege ought, however, to be deemed, as applied in this case, well founded. The law should not require exact nicety in treatment of one employe by another, in the course of business. The expression of opinion, though, in violent or measured speech, is after all nothing but the expression of opinion, and such an inquiry as was being conducted in this case was for the purpose of arriving at a conclusion of the guilt or innocence of a servant in and about the conduct of the master's business. What was said was consistent with the foreman exercising his duties in good faith. It would, indeed, be carrying the doctrine of liability quite far to say that sudden anger would be indicative of malice. Any immediate actual or supposed provocation ought to be regarded merely as *res gestae* in the inquiry.

NOTES OF IMPORTANT DECISIONS.

CONTEMPT—REMAINING IDLE AS CONTUMACIOUS REFUSAL TO PAY ALIMONY.—The Supreme Court of Oklahoma holds that a man who has no money or tangible property may be punished for contempt of court in failing to pay alimony adjudged to be paid by him, if he makes no honest effort, considering his physical and mental capabilities, to work and earn money to pay such alimony. Fowler v. Fowler, 161 Pac. 227.

The opinion was by a commissioner and was adopted by the court in whole. It refers to and quotes from a great number of cases, which range from absolute denial of power to compel a man to work to obtain money to pay the alimony adjudged down to a wide discretion on the part of courts to say whether idleness or not earning money is merely the result of reluctance to work. If the latter, it has been ruled there might be a commitment until he manifests sincere desire to work for the purpose of paying the alimony.

As to the reach of a court's power in an award of alimony, we find one of the cases saying: "A husband is not excused from the maintenance of his wife because he lacks an estate. He must labor, if need be, for her support; and if reluctant it is fortunate that it happens in this instance that he may be compelled to do so." Muse v. Muse, 85 N. C. 35.

But it seems that the most general view, that if the husband can work and won't work, the court will determine that he is contumacious

and will order his confinement until he complies with the order to pay, notwithstanding that so doing will prevent his laboring so as to comply. This looks greatly like holding a threat of punishment in terrorem and this is not a dignified thing for a court to do.

Why, however, may not a court jail a vagabond or a young husband living with his father in idleness and drinking and carousing at the latter's expense? If one can be prosecuted for abandonment of wife and children, why should he not be jailed for contumacious contempt in refusing to support them? However slightly some married women's cases might appeal to courts to exert drastic powers in their behalf, when the offspring of an ill-starred union are deserted and left to shift for themselves, courts ought not even to have to wait for any mere parties to pending suits to appeal to them, but they should have the right to act on their own initiative and compel both discontented parents to work, if need be, for their proper support. In the wreck of homes by swift marriage and easy divorce, destitution of children is what cries to heaven for redress, that is, if *mismates* shall have consented to children.

GARNISHMENT—INTEREST ON FUND ACCRUING AND TO ACCRUE.—Memory of the Danbury Hatters' case is revived by a decision by Second Circuit Court of Appeals, in which the question was, whether interest on a deposit in a savings bank belongs to defendant depositor or to the attaching creditor up to the time final process may collect his judgment. The court held that both principal and interest go to the creditor. Loewe v. Savings Bank of Danbury, 236 Fed. 444.

In this case attachment and garnishment caught in a savings bank, principal $18,461.54, upon which interest in the way of income and profits for more than 13 years had amounted to $11,278.13. Soon after the garnishment was secured, defendants assigned to United Hatters of America the dividends or interest accruing upon the principal and the assignee was given notice of proceedings.

The Court of Appeals goes into great discussion of the question involved, citing Shinn on Attachment, § 316, to the effect that it has not been judicially ascertained whether rents and profits are subject to attachment lien, and 2 Cook on Corps., § 482, that dividends on stock are attached along with the stock. It is said dividends are incident and follow the principal. Cary v. Savings Union, 22 Wall. 38, was cited to the effect that a share in profits paid by a savings bank is a dividend.

Reasoning along this line, the Court of Appeals, regarding the assignee as having no better status than defendant himself would have had, subjected the entire sum, principal and income or interest, to plaintiff's judgment.

It is conceded that rulings of Connecticut courts were to be followed, though the direct question had never been ruled in that state, but it had been ruled that there must be a debt at the time of service of garnishment for it to stand. In every state, however, there are provisions for the dissolution of garnishment by the garnishee giving bond. If he can release the money, then he can stop interest accruing on it. This would enable him to make a new contract with his depositors or their assignees. Where there is a right of this kind, a fair construction of statutory attachment and garnishment statutes is that it catches only what is in esse when the writ is served. Is there any essential difference, then, between dissolution by garnishee and assignment by the debtor? The essence of the question lies in the answer to the query, what does the creditor catch, when he serves his writ?

The Court of Appeals concedes that Connecticut decision makes imperative the existence of a debt at the time of service. Is an agreement, subject to option of either party to end it at any time, to pay money as long as present conditions continue, an agreement creating a garnishable credit?

PROXIMATE CAUSE—RETAILER CARELESSLY SELLING EXPLOSIVE AS RELIEVING WHOLESALER.—By California District Court of Appeals it was held that, where a wholesaler sells coal oil and gasoline mixed and discovery is made by retailer that such is the fact, and the wholesaler sends its wagon for a return of the oil, the act of the retailer in selling in the meantime some of the mixture, which he decided on test was not dangerous, is an intermediate act breaking the chain of causation between the wholesaler and the injured party. Catlin v. Union Oil Co., 161 Pac. 29.

It was said: "Upon notification by Riley (retailer) to the company of the state of affairs, the company had immediately dispatched their wagon to take the oil back and that while the wagon was waiting outside for that purpose, Riley tested up some of the oil and sold it. It was not incumbent upon appellant to have taken more steps than it did to prevent the independent action of Riley. Its responsible

duty to third persons had ended." Is this true? That duty existed as long as the oil was in the hands of another who might sell it.

Riley, as the proof shows, was the innocent cause of the injury. That he made a test satisfactory to himself does not change the liability the wholesaler was under.

But, even if his test was carelessly made, he became a joint tortfeasor with the wholesaler. Should the latter be relieved from liability to a consumer because it sold to a reckless, rather than a prudent, retailer? What has the consumer to do with the question of what character of man the retailer is?

But there was a test and by it the retailer was deceived as to the inflammable character of the oil. The law put it absolutely on the manufacturer to know that the fluid it sold was explosive and it was its duty not only to make an effort to rescue it from harm, but to rescue it. The retailer was its agent to redeliver it, and, certainly, not the agent of the ultimate consumer to do this. An intervening cause breaking causation cannot, so far as third persons are concerned, be one who acts in behalf of the original wrongdoer, or when called on fails to act.

SOME VIEWS OF THE RULE OF STARE DECISIS.

It will be observed that the title of my paper is "Some Views" of the rule, purposely chosen to justify its discursive character.

Origin.—For present purposes it does not matter how or when the rule originated—whether in obsequious deference to the judgments of royalty who originally sat as judges—or to the natural disposition of the human mind to follow beaten paths and the line of least resistance—or to the not unreasonable presumption that previous decisions are generally right—or to the indisposition of the courts to retry questions, *ut sit finis litium*—or, finally, from the yielding to necessity, in the interest of certainty and stability—though doubtless all of these were contributing causes.

Another contributing cause must have been the absence of a written code, and the very nature of the common law, as existing only in traditional customs.

Our rule has no existence in the civil law of Continental Europe. Indeed, the laws of several of the European states expressly declare that previous decisions shall not have the force of law, and in none of them, so far as I am aware, are such former decisions regarded as imperative precedents in future cases. I think we may account for this in the existence in these European states of their civil codes, in which the laws have been scientifically formulated, upon the basis of the Roman law—itself a highly developed system long before our ancestors left the forests of Germany or had substituted their diet of raw fish by the good roast beef and brown stout of Merry England.

Such codes have been potent influences in securing uniformity and certainty in the law, and in reducing to a minimum the exercise of the judicial discretion in its interpretation. But even under that system, precedents are regarded as instructive and highly persuasive—but in so far only as they seem sound expositions of the law. In other words, their value depends on their intrinsic merits.

Under the common law system, however, lacking as it does a scientifically constructed code as a basis, or, indeed, any code in a true sense, we are *ex necessitate* more dependent on the influence of previous decisions. If we strip these of all mandatory force, our unwritten law would be evidenced by no authoritative declaration, and every court, from the lowest to the highest, would be law unto itself. The rule of *stare decisis* is, therefore, a rule of necessity, and a natural evolution from the very nature of our institutions.

The Scope and Significance of the Rule.—Courts and commentators have made little or no effort to express this rule in other than the vaguest and most nebulous form, from which its Latin garb—*stare decisis et non quieta movere* does not rescue it. Possibly, for this vagueness of form we may

find good reason, in the course of our rambling about the ancient landmark.

I think that a fairly accurate statement of the rule, expressed in general terms, and as commonly received by the profession, would be this: A decision by a court of last resort, in a litigated controversy, on a question of law necessarily involved in the judgment, becomes a precedent, within that jurisdiction, for subsequent cases involving substantially similar facts. This, of course, excludes the decisions of courts foreign to the jurisdiction, and decisions of inferior domestic courts.

Obviously this is an unsatisfying statement, since it leaves untouched the real point of difficulty, namely, What is the significance of the term precedent? How authoritative is the precedent? Is it merely strong *prima facie* evidence of the law—or is it as imperative as a legislative enactment —or does it occupy some middle ground between these?

Assuming for the present that a given decision is an imperative authority for some doctrine of law, how is the precise significance of the doctrine thus established to be determined from the opinion and proceedings?

Failure on the part of counsel and of the court to give careful attention here is a fruitful source of error in judicial decisions. Clearly, the decision only becomes a precedent for the point or points actually arising on the facts of the particular case, and necessary to the disposition of the case. To ascertain with nicety and precision the true import of a particular decision—what we may term the doctrine of the case—requires a careful study of the facts. This doctrine is determined not by what the court said, but what the court necessarily decided.

The court may not by any words that it may use in its opinion alter the doctrine of the case. The moment the court departs from the precise principle involved, from that moment it speaks extrajudicially, and no opinion that it may express is authoritative. If the court's powers be legislative —a question to be touched upon later—it may legislate only for the particular case, with its accompanying facts—or if its role be that of discovery, it may discover only so much as is essential to dispose of that case and no more. It may deal only with a situation that has actually arisen in the past, and not one that may arise in the future. All else is *dictum*—in no sense authoritative, and deserving only such recognition as the reputation of the judge uttering it may warrant.

"It is a maxim not to be disregarded," said Chief Justice Marshall, in Cohens v. Virginia, 6 Wheat. 264, 339, "that general expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason for this maxim is obvious: The question actually before the court is investigated and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

To separate the doctrine from the *dicta,* as the chaff from the wheat, requires a delicate legal sense, and a painstaking study of every feature of the case. The facts and the judgment play a far more important part here than in the opinion itself. When the facts and the decisions are compounded and tried in the crucible of legal analysis, the resultant legal rule is the doctrine of the case, whether the doctrine itself be sound or unsound. By no use of words can the court extend, limit or qualify this result. As the compounding of certain chemicals produces a certain product, in spite of the incantations of the chemist, and as the tuning fork produces a certain note, unaltered by the uncultured ear that hears it, or the untrained voice that attempts to reproduce it, so the judicial disposition of a case, on a fixed state of fact, produces a doctrine which the court by no words that it may utter in its opin-

ion can alter—a doctrine to be ascertained only by scrutinizing the facts through the medium of the decision. A certain combination of notes produces a musical chord. The silencing of a single note, or the introduction of a new note, may produce a more pleasing effect, but the old harmony is altered. The skill to catch this note and to reproduce it faithfully marks the real artist in the law.

The doctrine of *stare decisis*, therefore, means not that the rule which is to be followed in the future is to be found in the language of the court, but in the principle necessarily resulting from the decision.

Authoritativeness.—Assuming that we have accurately ascertained the true import of our previous decision, there recurs the question of its authoritativeness.

Pursuing our inquiry, we shall find that previous decisions are of varying degrees of authoritativeness, dependent upon the particular circumstances under which they were rendered. If, for instance, the decision was by an evenly divided court, it has no force whatever as a precedent, but is binding only on the parties to that litigation; and if there be a dissenting minority, the decision loses something of its value as a precedent—the greater the dissent the less potent the precedent; and its force is still further reduced by a strong dissenting opinion.

So, where the decision was rendered in a case heard *ex parte*—or in a friendly and not hostile litigation—or is based on previously discredited authority, or on unsustained or misunderstood text-writers—or has been ignored in the jurisdiction of its origin—or overlooks and unconsciously overrules one or more prior decisions in the same jurisdiction—or, in the absence of sustaining local precedents, runs counter to settled principles as generally accepted in other jurisdictions, and not noticed in the opinion—all these considerations tend to weaken or destroy the force of the decision. And so a ruling that cannot stand the test of sound reason, and is obviously violative of fundamental principles, is an excrescence upon the body of the law, which, sooner or later, will be sloughed off and give way to sounder principles. These are but a few of the multitude of elements that enter into the proper valuation of a case as a precedent.

The *concessum* that the circumstances surrounding a particular decision may destroy or weaken its force necessarily implies that our rule of *stare decisis* is not absolute like a statute. And the multitude of overruled cases in England and in every American state attest that the rejection of unsatisfactory precedents has been the conceded prerogative and practice of the courts from the earliest days.

The consideration which shall justify a court of last resort in overruling its own decisions are not fixed and definite, but rest largely in the judicial discretion. The power is, however, practically without other limit than that which the judicial conscience may fix. The court is the final arbiter of its own powers, from whose judgment there is no appeal. Subject to qualifications to be noticed later, the legal right and power to declare one precedent, or one line of precedents, unsound, and to substitute a new principle more conformable to the judicial notion of justice or sound policy, carries with it the right and power to overrule any precedent, or line of precedents, if, in the deliberate opinion of the court, a wise policy demands it. What then becomes of our rule? A legal mandate which the courts may lawfully disregard is a solecism.

We may conclude, therefore, that the so-called rule of *stare decisis* is not a rule at all, in the sense of an imperative mandate, but mere judicial custom—or convenient maxim, which the courts have evolved for their own guidance, and which, like all other maxims, expresses a general truth only, or affords a general guide, subject to many variants according to the circumstances under which it is sought to be applied.

Practical Application of the Doctrine.—While there has been much inconsistency in the practical application of the doctrine by the courts, the profession is fairly well agreed as to its theoretical significance.

It is generally agreed, for instance, that inferior courts are imperatively bound by the decisions of the superior authority. And yet no one (other than disappointed counsel) would charge the judge of the inferior court with the breach of his judicial oath, or with an impeachable offense, because of his refusal to follow a decision of the higher court, which, in good faith, he believes to be in violation of sound principles, and an obvious judicial blunder. Such rejection by the lower court is often the only means of bringing the question anew to the attention of the appellate court, and thus affording opportunity for a correction of the blunder. But apart from any obligation to follow previous rulings of the higher court, the consciousness on the part of the inferior court that a departure from precedent is likely to be followed by a reversal, is in itself a powerful incentive to conformity.

How far the appellate court theoretically should follow its own precedents is a simpler question than the inquiry how far appellate courts *do* follow their own previous decisions in actual practice—since here theory and practice do not always go hand in hand.

Cases of Strict Application.—There is no dissent in theory from the proposition that considerations of justice and of sound policy most strongly plead for uniformity and certainty where local decisions have established a rule of property or of contract—or any other rule in reliance upon which the citizen would naturally plan his future conduct, whether viewed from the civil or criminal side—or where a sudden departure from former adjudications would disturb the social order—and certainly in every case where a similar departure by statutory enactment would run counter to constitutional restrictions. In cases such as these it is better that the law should be certain than always in harmony with legal analogies. There are unfortunately many instances to be found in the reports where this salutary principle has been disregarded, and grave injustice done.

Whether the overruling of a decision connotes that the rejected principle never was the law, or that it was the law until judicially rejected—in other words, whether the courts make the law or simply declare it—is a question over which a contest has raged among the legal philosophers since Bentham's day—and a contest into which I shall not here enter at large. But whether we assent to the one theory or the other, we know that not in the professional mind but in lay thought as well, for practical purposes, an established precedent is received as the law for that jurisdiction, whether by judicial enactment or by judicial discovery; and no citizen should suffer in his goods or in his person, because he has acted upon a rule that has been solemnly adjudged to be the law by the only tribunal established by the state for that purpose.

If the people in their sovereign capacity have thought the principle so vital as to need the protection of a constitutional prohibition against legislative enactments impairing vested rights, and against *ex post facto* laws, surely the courts, the peculiar guardians of justice, should not countenance judgments in defiance of the principle, merely because the written prohibition is addressed to the legislature and not to the courts. Injustice loses none of its iniquity because perpetrated under the guise of a judicial decision instead of a legislative enactment.

In such cases, even if the established principle violates what the court now considers sound policy, one of two alternatives should be followed: For sake of uniformity, the existing principle should be retained; or, for sake of a wiser public policy, it may be rejected, provided this may be done without prejudice to the parties in the in-

stant case by a violation of the principle just mentioned—that is, rights, privileges or immunities arising in the interval between the establishment and the rejection of the discarded principle,—rights and immunities which would have been saved to the citizen if the alteration had been effected by legislative instead of by judicial action—shall be governed not by the new but the old rule. In these cases, the principle of treating the decisions of the courts as actually establishing the law, until overruled, and regarding the overruling of decisions as tantamount to the repeal of a statute, is receiving more and more practical recognition from the courts. Such a principle means, of course, a repudiation of the theory that an overruled precedent never was the law, and a recognition of the theory, so ably maintained by Austin and Pomeroy and their followers,—and, what must be apparent to everyone who observes the practical working of our judicial systems—that the courts are in fact the artificers and not merely discoverers of the law.

Professor Pomeroy, whose luminous exposition of this subject is to my mind the most satisfying that the controversy has provoked, thus sums up his conclusions:[1]

"The common law of England is not now, never was, and never will be a complete system existing partly in actual precepts and partly in an undefined or cloudy state, ready to have the curtain rolled back and the law discovered by judicial action; it is rather a power continually reproducing itself, taking up fresh material and converting it into new regulations, new maxims, new applications, in short, a new code."

Without distinctly announcing its adherence to this theory, the Alabama Supreme Court in a well-known case[2] has been just enough to vindicate the principle. In that case a mortgage executed by a married woman, valid under the existing state decisions, was held to be a still valid and subsisting security, in spite of the circumstances that in the interval between the date of the transaction and the date of the hearing of the appeal in the foreclosure suit, the court had in other cases announced a different conclusion as to the validity of such mortgages.

And although the United States Supreme Court has uniformly held that the prohibition of the federal constitution against impairing the obligation of contracts is confined to such impairment by legislation or constitutional enactment only, and that such impairment by a judicial act is not within the purview of the federal interdict, this is rather an interpretation of the language of the constitution than a vindication of the principle which would sanction the impairment of vested rights by judicial action. What view that court may take when the question is fairly presented, other than as a jurisdictional one, seems foreshadowed in several cases in that court.[3] In a very late case in Mississippi the principle is[4] extended to the domain of the criminal law, and a later decision approving a statute previously held unconstitutional, was declared *ex post facto* as to an offense committed while the former decision was in force.

The principle that precedents shall be applied so as to make their operation prospective only, obviously makes difficulty. A rigid insistence upon the principle would, in many cases, render it impossible to establish the new precedent at all, since by the very act of overruling, the principle would, in the instant case, be violated. So that the consistency of the principle can only be preserved where the former precedent (which we may call A) is overruled in a case (B), in which the transaction arose anterior to the original precedent (A)—and the old rule is applied to transactions occurring in the interval between (A) and (B), and

(1) Municipal Law, sec. 38—elaborated in secs. 286-355.

(2) Farrior v. New England Mortgage Co., 92 Atl. 176.

(3) Gelpcke v. Dubuque, 1 Wall. 175; Douglas v. Pike County, 101 U. S. 677—and especially Muhlker v. N. Y. & H. R. R. R. Co., 197 U. S. 544, and Kuhn v. Fairmount Coal Co., 215 U. S. 349.

(4) Longino v. State, 67 So. 902—editorially discussed in 2 Virginia Law Review 609-612.

coming up for decision later than (B). Further, such a principle—particularly in connection with the interpretation of constitutional or statutory enactments,—in which connection it is of most frequent occurrence—may produce the anomaly of the temporary suspension of a valid constitutional or statutory enactment by judicial action—with the result, for example in the criminal law, that of two persons indicted for breach of a criminal statute, both equally guilty of the forbidden act, one is legally guilty and the other legally innocent. Howsoever illogical, the result appeals to our sense of justice. If it may not be justified on other grounds, the principle of estoppel against the court itself, or against the state, for which the court speaks, would seem sufficient.

Where the Rule is Not So Strict.—Where, on the other hand the overturning of a former decision will not disturb vested rights nor interfere with social order—where, for example, instead of avoiding titles and upsetting contracts, or otherwise working injustice through its retrospective operation, the effect is precisely the opposite—if the court be satisfied that the former decision, or even a line of decisions, is unsound, either because of original inherent error or because of changed conditions, the doctrine of *stare decisis*, properly interpreted, not only does not forbid the overturning of the old principle and the adoption of a new and sounder rule, but rather, in my judgment, enjoins it as a duty.

To deny this right and this duty to the courts is to condemn the methods by which the common law of our day, in spite of its many inconsistencies, has become, what we know it to be, a splendid system of jurisprudence, and wonderfully suited to the genius of our people. A striking feature of the common law is its elasticity and its capacity to mould and adjust itself to new needs and new conditions, and thus, by constant growth, without haste but without rest, to keep pace with the enlightened public opinion of the people by whom and for whom it has been fashioned. But it can only be thus moulded and adjusted, and shaped to wiser purposes, by the courts—since statutory enactments constitute no part of it; and if we have learned aught by experience, it is that our American legislatures are either indifferent to the inconsistencies and shortcomings of the law, or else are incompetent to remedy them.

A denial of this judicial function of breaking away from ancient traditions, would have left the unwritten law of our present day as it was in the dark ages, and we should still find ourselves governed by the crude legal conceptions prevailing in the days of trial by battle or the ordeal of fire. Our common law of to-day is not the common law of Lord Coke's day, nor of Blackstone's day, nor even of our immediate forefathers. As expressed by Mr. Justice Holmes,[5] our common law "is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains the old ones from history at the other, which have not yet been sloughed off. It will be entirely consistent only when it ceases to grow."

The trouble has been and is, in my judgment, not that the courts have done violence to the law by too frequent an exercise of the power to overrule, but by failure to follow a consistent practice, they have erred by overruling when they should not, and by refusing to overrule when they should. And I am not sure that, on the whole, our jurisprudence has not suffered more by too strict an adherence to precedent than a departure from it.

Lest I be considered an iconoclast, and a preacher of heresy, let me make my position a little clearer. I attach a peculiar value to the maxim of *stare decisis*. To my mind, when properly understood, it expresses a wise philosophy. A judge who lightly disregards it lacks an essential judicial qualification. It is the chief corner-

(5) The Common Law, 36.

stone of our legal structure. Without a proper adherence to its spirit, and until some great code maker shall give us our law in better form, we should be without compass, chart or anchor.

My point is that in their ultra-conservatism, the courts are disposed unwarrantably to make a fetish of precedents, and blindly to worship them, as the Chinese their ancestors—and far beyond what the spirit of our rule requires or warrants; and that, as a result, the law lingers far in the rear of that enlightened public opinion which it should, in large measure, portray. And thus the process of adjustment to new conditions, and to newer and more enlightened policies, is unreasonably retarded.

The doctrine that the courts themselves contribute to this moulding and expansion of the law, instead of relegating the duty to an indifferent and inactive legislature, is regarded as heretical by the great majority of the judges; and no doctrine ever came under severer judicial condemnation, if we have regard to the language and not to the action of the courts. The court that desires to follow its previous rulings, whether because it believes them sound, or in order to escape the labor of reconsidering them, will be found asserting the rule of standing by previous decisions in most imperative and laudatory terms, and declaring itself imperatively bound by what has gone before. The same court, when confronted with an inconvenient precedent that stands in the way of what it conceives to be a righteous judgment in a particular case (especially if announced by a predecessor no longer on the bench), will be equally eloquent in defending the right and duty to overrule. And I believe the statement is well within the truth, that those judges whose memories are held in highest honor by those of succeeding generations are those who have shown least disposition to follow precedent blindly.

The doctrine which we may term that of *non stare decisis* is equally unpalatable to the average practitioner, whose chief concern, from the very nature of his occupation, is rather to keep himself advised as to what the law is, as declared by the courts, than to consider what it ought to be, or to lend himself to the task of making it better.

Nobody doubts that the law made (or discovered, if the term be preferred) by the judges is of a far superior quality to that produced by our legislatures—certainly so far as concerns what we may term private law, as distinguished from that of a public or political nature. Every proposition of law judicially announced has the deliberate consideration of judges with trained legal minds and consciences—the court has the advantage of the argument of counsel, who with the life, liberty or property of the client at stake, and urged by their own personal and professional interests, are incited to exhaust every possible argument that seems to bear on the question at issue. Thus every phase of every question is threshed out in its concrete application, and thus the court is supplied with material for a correct conclusion. This conclusion when announced, unlike a legislative act, is accompanied by a statement of the reasons that induced it, and the opinion is published and submitted to the whole body of the profession for criticism; and finally, as a special incentive industriously to seek legal truth only, the judge who delivers the opinion has the consciousness that his opinion will be embalmed in the imperishable literature of the law, as a help or hindrance to future students and investigators, long after he has passed from the judicial stage.

Again, the entire body of our judge-made or judge-discovered law, other than constitutional interpretations, is subject to repeal or alteration at the will of the legislature. The function, therefore, which the courts are exercising, and have exercised for centuries, as law-givers, seems well guarded against judicial tyranny; and in actual results has been, on the whole, wisely and conscientiously administered.

Hindrances to Correct Development.—Among the more serious hindrances to the orderly development of legal truth is the unfortunate habit of courts to wander outside of the record, and, consciously or unconsciously, to essay the adjucation of principles not involved in the case under consideration. These extrajudicial excursions into forbidden territory have far-reaching and deplorable consequences. The reporter inserts both doctrine and *dicta* in his headnotes—the digester follows the reporter—the text-writer follows the digester—and from the text-book there is an easy step back into the reports again, and this time with the error enthroned as legal truth the bar sinister effaced in the course of the circuit.

To my mind the half-baked quality of the modern text-book, and the growing disposition of the courts of last resort to rely upon these distinctly untrustworthy compilations as if they were primary sources of the law, have been fruitful sources of much of the errors and inconsistencies of our unwritten law. The text-writer is confessedly dependent on the courts for every principle he announces. That the courts should in turn take their cue from the text-writer would seem a startling proposition to one not accustomed to this labor-saving expedient. There is, of course, no surer method of perpetuating error.[6]

Another source of error is the human element in the judges, who allow themselves to be swayed from principle by the moral aspect which a particular case presents. Judges are prone to forget that in the decision of a controversy between two citizens, they are laying down a rule for all citizens of the future. Where, for example, the question is political or quasi-political, the spirit of party or the specter of a disapproving popular majority is apt to disturb the even scales of justice. So, in the construction of so-called unnatural wills, which violate one's natural sense of justice by the exclusion of those who are nearest in blood—or, in any case, where there is a sharp conflict between the legal and moral aspect of the case, the ruling is apt to illustrate the proverb that hard cases make bad laws.

And in seeking for causes for ill-digested conclusions we must not overlook the crowded conditions of the dockets—nor the superficial briefs of counsel whose function it is to illumine, but whose briefs in too many instances darken the counsels of the court—nor the evil of one-man opinions, which has already been a subject of consideration by several bar associations—nor the false economy of reducing judicial salaries, with the result in many parts of the

(6) "It is universally understood, there is indeed no necessity for citing authorities to the proposition, that the dicta uttered by the judges in pronouncing their opinion is no part of the authoritative law; though the habit of looking into them, if not abused, is not therefore to be deemed evil. But they are among the very lowest evidences of the law. Viewed as opinion, they are not the opinion of the collective judges, but simply of the particular judge speaking. And, traveling as they do on the outside of the record, they are mere gratuitous utterances, not in discharge of a duty, not necessarily within the investigations of the counsel who have argued the case, not in similitude to the writings of a text-author who, if he has done his duty, has consulted all the cases, and extended his investigations through the entire subject, but they are the mere uncalled for overflow of the mind of the lawyer who has not the authorities before him, who has only given the subject a superficial investigation, and who in every other respect, is without the equipment for correct speaking.

"And the present writer asks permission to state another thing, as the result of more than forty years' time spent in the uninterrupted reading of judicial decisions and writing the law thereupon: namely, that the dicta of judges, even of the most eminent ones, constitute a huge mass of contradictions piled upon contradictions, and that an author, by skillful selection, could write any sort of doctrine on any and every subject of the law, by simply repeating the words of the selected dicta; and all the fools would praise his book for its marvelous accuracy. And this is simply what every lawyer who has learned his profession knows. And, at the same time, it is simply what nine-tenths of the lawyers, including those of them who are on the bench, constantly overlook. It is this overlooking of things which we have seen in other connections, brings disaster to the law."

Bishop, Marriage, Divorce and Separation, 1747.

country that judicial appointment is no longer regarded by the bar as professional promotion.

Is it not a fair conclusion, however, that in spite of some uncertainties, and of some inconsistencies, and of many difficulties of application, our judge-made law, based on the spirit but not bound by the letter of our maxim, is, on the whole, a wise, uniform. comprehensive and understandable body of jurisprudence? W. M. LILE.

University of Virginia,
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PRINCIPAL AND AGENT—PAYMENT BY CHECK.

POTTER v. SAGER, et al.

Supreme Court, Equity Term, Monroe County, December 9, 1916.

161 N. Y. Supp. 1088.

An agent authorized to collect his principal's debt cannot accept payment in anything other than money, so that delivery of a check or substitute for money does not constitute a payment until accepted as such and actually paid in due course.

SAWYER, J. From about the time of her appointment as administratrix until shortly before the commencement of this action, plaintiff intrusted the management of her trust estate very largely to her husband, J. Forbes Potter; he, however, consulting with and adopting her suggestions in matters deemed of importance. Mr. and Mrs. Potter were residents of the city of New York, while the property of the estate, which consisted of real estate, mortgage securities and money in bank, was located in the city of Rochester. In the spring of 1900 Mr. Potter, apparently as a matter of convenience and to save the time and expense incident to otherwise necessarily frequent trips between New York and Rochester, appointed the witness, Byron N. Sherwood, as Mrs. Potter's local representative in Rochester, authorizing and empowering him to, in her behalf, collect the rents and interest moneys belonging to the estate as same became due. This appointment was made without consultation with Mrs. Potter, but Mr. Sherwood continued to act thereunder until the spring of 1914, and under circumstances which preclude any denial by Mrs. Potter of knowledge as to him or his business relations with the Morley estate, and which in law conclusively charge her with having adopted and ratified his appointment as her local agent. In the course of his agency, Mr. Sherwood not only did the things for which he had received specific authority, but assumed to and did collect on many occasions the principal of mortgages belonging to the estate, properly depositing such moneys in plaintiff's bank account, and reporting same to her in connection with his reports of his other activities. The fact that such collections of principal came to plaintiff's knowledge is fully established, and the case is bare of any proof that she made objection thereto or forbade future collections of principal by Mr. Sherwood. From the evidence as a whole, it is apparent that in July, 1913, and continuously thereafter to and including the month of January, 1914, both plaintiff and Mr. Sherwood understood that he was authorized to collect in her behalf such moneys as might become due to her, whether the same consisted of rents, principal, or interest, and that he was in fact her agent therefor.

I am not unmindful of plaintiff's argument that the collection of principal might involve discretionary action, and if confided to Mr. Potter could not be by him delegated. There can be no question but that such is the rule, but it does not seem to be here presented for discussion, inasmuch as Mr. Sherwood's authority in that regard is predicated on plaintiff's adoption and ratification of the collections, authority for which he originally assumed. Among other assets of the estate is a certain bond and mortgage executed by these defendants upon the 29th day of May, 1911, and the interest upon which became due, beginning with July, 1911. Checks for its interest as same fell due were given by defendant to Mr. Sherwood, and there was likewise made to him two payments, of $1,000 each, which defendants desired to make upon the principal sum of the obligation. The proceeds of all the checks so received by him, save two, were deposited by Mr. Sherwood to plaintiff's credit in her proper bank account.

The check of July 9, 1913, for $75, claimed as a payment of interest then due, and that of July 15, 1914, for $1,075, claimed as a payment of $75 of interest then due, together with $1,000 on account of principal, were, however, cashed by Mr. Sherwood and their proceeds by him appropriated to his own use. That defendants were justified in making to Mr. Sherwood,

as such agent, payments of both principal and interest upon the debt owing plaintiff, necessarily follows from what has been heretofore said. An agent authorized to collect his principal's debt is, however, under the restraint of well-settled rules of law, with knowledge of which these defendants are charged, and among them is that which forbids such an agent to accept payment in anything other than money. Burstein v. Sullivan, 134 App. Div. 623-625, 119 N. Y. Supp. 317; Fellows v. Northrup, 39 N. Y. 117-121; Doubleday v. Kress, 50 N. Y. 410-415, 10 Am. Rep. 502. And the delivery to an agent of a check or other substitute for money does not constitute a payment, and only becomes so when accepted as such and in due course actually paid. Bernheimer v. Herrman, 44 Hun. 110; Burnstein v. Sullivan, supra; Hunter v. Wetsell, 84 N. Y. 549, 38 Am. Rep. 544.

The language, "when accepted as such and in due course actually paid," used in Hunter v. Wetsell, supra, must be construed as declared in § 148 of the Negotiable Instruments Law, which provides:

"Payment is made in due course where it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective."

All the cases wherein the effect of the delivery of a check or other substitute for money to an agent has been discussed, so far as I am able to ascertain, are those in which the check was made payable either to the principal, or to the agent as such, and involve either a forged indorsement or a misappropriation after actual payment to the agent in his trust capacity.

That under consideration presents an entirely novel feature, in that the debtor delivered, in attempted payment, checks drawn, not to plaintiff, or to the agent as such, but to Mr. Sherwood individually. "There is nothing upon them indicating that any one, except the person named therein as the payee and those to whom he and succeeding indorsers made them payable, had any interest in or connection with them." I do not see that the situation is bettered by the evidence as to whom or the purpose the money was intended for; that does not affect the question whether or not the delivery of the checks to Mr. Sherwood did in fact and in law effect payments upon the plaintiff's mortgage, because, even though Sherwood had authority to make collections of interest and principal of the mortgage he had no authority to accept therefor anything but money. This he did not receive, either from the hands of defendant, or by the payment to him in due course of defendant's checks issued to him in his capacity as agent. The legal restrictions concerning dealings with agents are founded upon substantial reasons, and neither ignorance of the law nor bona fide intention will avoid the disability incurred by their violation. The most that can be said is that by dealing with him as an individual, instead of as plaintiff's agent, defendants constituted Mr. Sherwood their messenger for the transmission of the amount of the checks to plaintiff; in so far as the moneys so sent were actually received by her, she must give defendants credit, and further than this she need not go. Under the checks as drawn, the drawer paid their amount to Mr. Sherwood as an individual, and its reception by him was not a payment of defendant's indebtedness either in money or by check received as such and paid in due course. It may be said that such construction results in hardship for defendants, but the sufficient answer is that where, as here, the loss must fall upon either one or the other of parties whose equal good faith is beyond dispute, their respective rights can only be adjudged by a strict construction of the law—this is but equity.

Plaintiff's motion to so amend his complaint to conform with the proofs is granted, and a decree foreclosing the mortgage and adjudging that there is unpaid thereon $3,000 of principal, with interest at 5 per cent per annum, from January 1, 1913, less $50 paid July 16, 1914, and containing the usual provisions for a sale of the mortgaged premises by a referee to be appointed by the court, is directed.

NOTE.—*Collection by Check Payable to Order of Agent Authorized to Collect Money.*—The rule is indisputable, that an agent to collect has no authority to collect anything but money. And it must be conceded, that, if such an agent receives a check and receipts for it as payment, his forwarding the check to his principal and his failure to realize thereon, the check being promptly forwarded, will not discharge the indebtedness. But this is upon the theory that the check is payment contingent on itself being paid.

In the instant case, however, the check was made payable to the order of the agent, it was collected and the proceeds misappropriated. When did the act of the agent become that of his principal, if ever? It did not at the time the check was received. Did it when the agent received the money? It received that money from the agent of the debtor, that is to say the bank acting by his directions. If the debtor had paid the agent the cash there would be no doubt that the debtor would be excused. But is not what one does by his agent, the doing of a thing by himself?

Take for illustration Jackson v. Natl. Bank, 92 Tenn. 154, 20 S. W. 802, 18 L. R. A. 663, where a drummer with power to collect accounts received a check payable to the order of his prin-

cipals. He indorsed it in their name by himself and the bank paid it. He failed to account to his principals, who brought suit against the bank and recovered. The court said there was no authority by implication that he could indorse checks payable to them, though he was authorized to receive money and checks so payable. It was said such indorsement was not a necessary incident to collection of accounts. See Graham v. U. S. Savings Inst., 46 Mo. 186. In this case, however, he was principal's agent to receive the check because his authority expressly extended thus far.

In Hart v. N. W. Trust & S. Bank, 191 Ill. App. 396, an agent with the right to collect from a bank for material furnished to it by principal, received from the bank signed by its teller an order on itself for the amount payable to principal's order. The agent immediately asked for the money and upon his signing the order in the name of his principal, per himself, the bank paid him the money. The agent disappeared with the money. On the trial plaintiff admitted the agent had the right to collect. It was said: "It is claimed, however, that his authority to collect did not authorize him to indorse the check which the bank gave him. * * * The contention is extremely technical, and we think it is without merit. Ross had no authority to receive a check in payment of the account, and when the check was handed to him he did not accept it in payment, but at once asked for the money. The delivery of the check to him and the payment of it by the bank upon his indorsement all constituted but one transaction, and amounted to a collection by Ross of the amount due. The check was not that of a depositor, drawn against his deposit in the bank. It was a mere acknowledgment of indebtedness * * * and the indorsement of Ross was, in effect, but a simple receipt for such indebtedness." At least, however, it is perceived that acts preceding the actual receipt of the money by an agent are not necessarily as representing the principal. The final act in collection may alone be determinative.

In W. B. Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535, 23 S. W. 728, a collecting bank received a check and turned over a draft stamping it paid. As soon as it ascertained there were no funds to meet the check it demanded of the drawee the return of the draft. The drawer sued the bank but was held not entitled to recover, because in acceptance of the check nothing had been done to prejudice plaintiff's original rights. The effect of this is to say the agent had done nothing in execution of his agency by merely accepting a check. But, if he had collected it, would he not have been acting for his principal and not for the drawer of the check?

To the same effect is Tubman v. Lowekamp, 43 Mo. 318, where an agent received cash and other property. His act was held binding as to the money only—that is to say, there was a partial execution of his agency.

In Hadley M. Co. v. Kelley, Ark., 174 S. W. 227, it was said: "The authorities seem to be quite unanimous in holding that, without express authority from the principal, an agent cannot accept any kind of commercial paper in satisfaction of a debt due to the principal. Of course, if an ordinary check is given in accordance with business customs, and is for immediate presentation, it constitutes merely a vehicle for the collection; and if the check is in fact paid, it amounts to the same as if the money had been paid over; but such is not the case here. The paper taken by Burke (the agent) was a time check payable to himself. * * * The acceptance of the paper was therefore neither within the actual nor the apparent scope of Burke's authority." Burke negotiated the check at a small discount and disappeared. Defendant was held liable for the amount of the account, the principal not being bound by the giving of such time check. But the court states in effect this would have been different had an ordinary check payable immediately to and collected by the agent been given.

In Morrison v. Chapman, 140 N. Y. Supp. 700, 155 App. Div. 509, the authorities were run down very fully and they were summarized as follows: "If the agent had received money or a check drawn to bearer, there I think would be no doubt that payment to him would have been payment to principal and if the agent had stolen the money the loss would have fallen on the principal." But this was said in a case where the agent had authority to receive money or checks. Would it make any difference had he been authorized only to receive cash, and received a check and collected it?

It seems to us that the view taken by the Arkansas case is correct. Time intervening delivery and presentation is of no consequence and if there is negligent delay it is the fault of the agent.

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 119.

Employment—Inconsistent; accepting retainer to defend title insurance corporation against suit on its policy, while acting as record attorney, pursuant to the terms of the policy, for the insured, in litigation—cautionary suggestions.

A title company insured Doe's title. Doe sold to Roe, who rejected title and sued Doe. Pursuant to its title insurance policy, the title company employed an attorney to defend the action for Doe. Prior to judgment in this action Doe began a suit against the title company upon its policy.

The attorney above referred to has had no confidential communications with Doe, the action of Roe v. Doe turning entirely upon questions of law.

An appeal in Roe v. Doe is pending, with the same attorney employed by the title company appearing for Doe.

May this attorney with propriety represent the title company in the suit brought against it by Doe? Or in a future suit or suits brought against it by Doe on the same policy?

ANSWER No. 119.

Doe being separately represented by his own attorney in the action between himself and the company, and having by his own contract consented to his representation in the other action by the attorney designated by the title company—the committee is of the opinion that the attorney is not representing conflicting interests within the scope of the rule reprobating inconsistent employment.

This answer is explicitly limited to the situation disclosed by the question: i. e., of a contract with an indemnitor which binds Doe to accept the defense of his title by the title company and its attorney thereto designated. But the attorney must bear constantly in mind that in the first action he represents Doe, and that he and the title company must not allow its contract interests, nor the amount of its indemnity obligation, to affect his defense of Doe's rights as vendor. (See Brassil v. Maryland Casualty Company, 210 N. Y. 235.)

QUESTION No. 122.

Fees; Clerks—Agreed compensation of non-professional clerks in law office by share of annual net profits—disapproved.

Do you think it improper for an attorney who has a considerable number of employes to permit them to participate in the annual net profits as part of their compensation or salary? This scheme has been found to promote efficiency in mercantile establishments and I would like to install it in my office, but it has occurred to me that it is susceptible of the construction that a lawyer is sharing his fees with a layman, in view of the fact that a number of my employes are not admitted to the bar.

However, it seems to me that it is more logical to merely view the matter as additional salary.

ANSWER No. 122.

In the opinion of the committee, the gratuitous distribution by a lawyer to his employes of moneys in an amount based on his annual profits, is not open to any reasonable objection. But making in advance an agreement with non-professional employe to share profits with them, is, in the opinion of the committee, inconsistent with the essential dignity of the profession, and is liable to be made the cloak for promoting the solicitation of employment for the office.

HUMOR OF THE LAW.

KNOWING THE LAW.

John Boyd was a thrifty farmer, but an exceedingly cautious man. He hauled hay to Marshall, Saline County, his nearest market, on Saturdays, and sometimes let his wagon stand on the "square" while he went around making purchases for the house.

There was a piratical cow roaming around town at her own unfettered will, and she soon became acquainted with John's habits, and knew it was dinner time when he came to town. John had "shooed" her away from his hay wagon until he got tired, and at last he sought legal advice. Judge Samuel Davis, of the Fifteenth Circuit Bench—then a practicing attorney—was the recipient of John's tale of woe.

"Colonel Davis," he said, "if you drove to town every Saturday afternoon with a little jag of hay, and an old speckled cow come around and eat up the hay while you was buying molasses and things at the store, what would you do to that cow,"

"Shoot her," said Davis, promptly.

"Hey?"

"You bet I would. I think I know that old cow, and if she'd come along poking her nose in my wagon, I'd blow her blame brains out too quick."

John wasn't entirely satisfied. He thought over the matter, and concluded to pass the question up to another disciple of Blackstone. Davis' advice smacked too much of anarchy. So he consulted William Thorgmocton, an old and tried advocate.

"You chump, you, don't you know if you killed a man's cow that way you'd be guilty of a felony, and they'd send you to the penitentiary?" said Thorgmocton, indignantly.

"But Colonel Davis said to shoot her."

"He did, eh? What does he know about law, I'd like to know! Never won a case in his life except by a scratch on some miserable technicality. But you do as you please, John—kill her and go to the pen if you want to."

John went back to Davis, and told him what Thorgmocton had said.

"Said I didn't know anything about law, did he?" roared the Colonel. "Well, we'll see who's right. You come in next Saturday with your hay and a gun, and if that cow gets near your wagon, shoot her down. If they send you to the pen I'll go in your place. I'll teach that fellow what I don't know about the law!"

"But, Colonel," protested the hay merchant, "he read me a whole lot of stuff out of the books, and said there was no getting around it."

"Read fiddlesticks!" thundered Davis, "He's dead wrong, I tell you. I know, because that old speckled heifer's my cow!"—Case and Comment.

WEEKLY DIGEST

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1. **Arbitration and Award**—Future Damages.—Arbitrators appointed to determine compensation of owner of land for construction of poles and lines by street railway did not exceed authority in considering future damages and right of defendant to pass over land at any place.—Thornburgh v. West Penn Rys. Co., Pa., 98 Atl. 894.

2. **Attorney and Client**—Authority of Attorney.—Counsel employed to represent a party to a suit have large powers and authority as to entering into agreements and stipulations, but have no authority to waive legal rights guaranteed their clients by law, contrary to their clients' express wishes and directions.—Lyman v. Kaul, Ill., 113 N. E. 944.

3.——Estoppel.—An agreement by attorneys to represent a vendor in a suit to recover the land for fraud does not preclude them from representing a grantee of the purchaser, who claims to be an innocent purchaser, against the vendor.—Trulin v. Plested, Iowa, 159 N. W. 633.

4.——Lien.—Act of client, who settled his damage suit against railway for $30, in tendering his attorney $20, the contract between them providing the attorney should receive 50 per cent was not conclusive of the attorney's right, under Act April 15, 1914 (P. L. p. 410), giving an attorney's lien on the proceeds of a settlement out of court, to receive 50 per cent and costs.—Levy v. Public Service Ry. Co., N. J., 98 Atl. 847.

5. **Bailment**—Services.—One with whom goods were left to be manufactured into garments held entitled to recover for services, where after being made and before he was in default as to returning them, they were stolen without fault on his part.—Weiss v. Rothblatt, N. Y., 161 N. Y. Supp. 69.

6. **Bankruptcy**—Appraisement.—Appraisers appointed to value property of bankrupt should make a reliable inventory, especially where receivers are operating the business, and their fees should be paid on basis of a careful inventory.—In re Mills Tea & Butter Co., U. S. D. C., 235 Fed. 812.

7.——Bona Fide Purchaser.—Trustee in bankruptcy, having the right of attaching creditor, is not ipso facto a bona fide purchaser for value, and that he is such, unaffected by outstanding equities against the bankrupt, is an affirmative defense, which must be pleaded and proved.—Coates v. Smith, Ore., 160 Pac. 517.

8.——Compensation to Receiver.—The compensation of receivers specified in the Bankruptcy Act is not intended as a fixed, invariable amount to be awarded, but as the maximum to be allowed only in cases justifying it.—In re Mills Tea & Butter Co., U. S. D. C., 235 Fed. 813.

9.——Composition.—Where, in composition case, 25 per cent cash or 100 per cent stock of par value of corporation formed to take over bankrupt's business were offered as alternatives, held that the referee's commission should be computed on theory that stock was worth 25 per cent cash.—In re Mills Tea & Butter Co., U. S. D. C., 235 Fed. 815.

10.——Contempt.—On petition by trustee to recover property concealed, held that order, which found that bankrupts not only had concealed the property, but were at time of entry or order in control of it, was not open to objection on theory that it would be conclusive that bankrupts in event of failure to deliver property were guilty of contempt.—In re Jacobs, U. S. C. C. A., 235 Fed. 706.

11.——Disallowance of Claim.—Order of referee in bankruptcy, disallowing a claim approved by trial court, will not be disturbed, where supported by substantial evidence.—Henderson v. Morse, U. S. C. C. A., 235 Fed. 518.

12.——Estoppel.—Where a company not subject to adjudication in bankruptcy acquiesced in the appointment of receivers and their conducting its business for a considerable time, held, that it is liable for the compensation of such receivers.—In re Wilkes-Barre Light Co., U. S. D. C., 235 Fed. 807.

13.——Exemption.—Insurance on the life of a bankrupt payable to his wife held exempt under Act Pa. April 15, 1868 (P. L. 103), and not property of the estate which passes to his trustee.—Frederick v. Metropolitan Life Ins. Co. of New York, U. S. D. C., 235 Fed. 639.

14.——Jurisdiction.—Though the company against which was filed an involuntary petition in bankruptcy was not subject to adjudication, a court of bankruptcy which entertained the petition and appointed a receiver had jurisdiction over the parties and the subject-matter.—In re Wilkes-Barre Light Co., U. S. D. C., 235 Fed. 807.

15.——Mortgage.—A mortgage given by a bankrupt firm to the wife of one of the partners for joining in an assignment of her husband's

life insurance policies held without consideration.—In re Farrand, U. S. D. C., 235 Fed. 809.

16.——Mortgage.—The purchase by the mortgagor at a sale in bankruptcy of the mortgaged chattel does not defeat the mortgagee's right to recover the chattel.—Crouch v. Fahl, Ind., 113 N. E. 1009.

17.——Preference.—Dividends paid by an assignee under an assignment made within four months prior to bankruptcy are not preferences which the creditors must surrender before proving their claims.—In re Vorck, U. S. D. C., 235 Fed. 655.

18.——Schedules.—Where a bankrupt, believing that under a contract he was not entitled to certain funds, did not include such funds in his schedules, he cannot, though he verified the schedules, be denied discharge on the ground of making false oath.—In re Opava, U. S. D. C., 235 Fed. 779.

19. **Bills and Notes**—Consideration.—Where a note is executed to a bank to meet the requirement of the state superintendent of banks that deficiency of assets be made good to enable the bank to continue business, neither want nor failure of consideration is available in an action on the note by the state superintendent of banks. —State v. Hills, Ohio, 113 N. E. 1045.

20. **Bridges**—Delegation of Power.—A county cannot delegate its duty to keep an approach to a bridge in reasonable repair so as to relieve itself from liability for its condition.—Clark v. Sioux County, Iowa, 159 N. W. 664.

21. **Carriers of Goods**—Common Carrier.—A common carrier need not accept for transportation milk, the transportation of which would violate an ordinance of the city of its destination.—City of Chicago v. Chicago & N. W. Ry. Co., Ill., 113 N. E. 849.

22.——Demurrage.—Shippers' loading of cars with pulp wood during railroad embargo thereon at destination, and his refusal to unload upon demand, held not a use of cars for transportation authorizing a demurrage charge, for time cars were held on tracks before road accepted them for transport after raising of embargo, under St. 1915, §§ 1797—4, 1797—10.—Chicago & N. W. Ry. Co. v. Pulp Wood Co., Wis., 159 N. W. 734.

23. **Chattel Mortgages**—Ratification.—Where a bank, holding mortgage on a crop of corn, knew that money given it by mortgagor was proceeds of mortgagor's sale of corn to third party, it could not retain the money without ratifying the sale and losing its lien on the property sold.—Sloan State Bank v. B. M. Stoddard & Son, Iowa, 159 N. W. 636.

24. **Commerce**—Injunction.—Where the old rates had injured a town in Iowa, new rates permitted by Interstate Commerce Commission will not be temporarily enjoined pending a suit against enforcement, though such rates might temporarily injure towns in South Dakota.— Brown Drug Co. v. United States, U. S. D. C., 235 Fed. 603.

25.——Overcharges.—Under Interstate Commerce Act, § 9, a state court, before application for redress to Interstate Commerce Commission, had no jurisdiction over action by consignee of interstate freight to recover overcharges for demurrage collected by the railroad pursuant to tariff governed by uniform car demurrage rules approved by Commerce Commission.—Henry L. Hunter, Inc., v. New York, N. H. & H. R. Co., N. Y., 161 N. Y. Supp. 10.

26.——Police Power.—Waterville ordinance, prohibiting exposition of meat for sale unless inspected by the municipal authorities or bearing the inspection stamp of the United States Department of Agriculture, is not in conflict with the federal constitution as an interference with interstate commerce.—State v. Maheu, Me., 98 Atl. 819.

27.——Regulation.—By Act March 4, 1909, § 240, Congress has expressly exercised its power to regulate interstate commerce shipments of intoxicants, and therefore state regulations such as that embodied in Prohibition Act Colo. (Laws 1915, p. 275) § 10, as to marking of such packages, are invalid.—Chicago, B. & Q. R. Co. v. Giles, U. S. D. C., 235 Fed. 804.

28.——Transportation.—That other carriers, not parties to a proceeding before the Interstate Commerce Commission, participated to a small extent in the transportation of shipments on account of which an award of damages was made against defendants, held not to invalidate the award.—Missouri Pac. Ry. Co. v. C. E. Ferguson Sawmill Co., U. S. C. C. A., 235 Fed. 474.

29. **Confusion of Goods**—Lien.—Where the purchasers of corn, mortgaged to a bank, mingled it with their own corn, the bank could not assert its lien against the specific property, and was left to a right of action for conversion. —Sloan State Bank v. B. M. Stoddard & Son, Iowa, 159 N. W. 636.

30. **Corporations**—Exemplary Damages.—Exemplary damages may be allowed against a corporation for the assault of its agent, though the assault exposed the agent to a criminal prosecution; the corporation not being exposed to a criminal prosecution.—Indianapolis Bleaching Co. v. McMillan, Ind., 113 N. E. 1019.

31.——Ultra Vires.—Neither an individual nor a corporation is entitled to retain profits of a transaction or anything of value received from the other party and set up ultra vires as a defense to enforcement of the contract.—Wrightsville Hardware Co. v. McElroy, Pa., 98 Atl. 1052.

32. **Damages**—Where land was devised in trust to husband and wife and the survivor, and to their children when the youngest reached 25, deed of daughter who had reached 25 at her father's death, but who predeceased her mother, purporting to convey her interest as "heir," would be construed as conveying her interest as child.—In re Robinson's Estate, Vt., 98 Atl. 826.

33. **Deeds**—Reservation.—Where two prior deeds are referred to in a conveyance, the first because it contained a full description of the land, it did not serve to destroy a reservation in the second deed.—Ball v. Streeter, Mass., 113 N. E. 1034.

34.——Wills.—Where a father conveyed land to his daughter by deed duly executed and delivered, that the grantor retained possession, paid the insurance and taxes, and leased property showed that a deed was not intended to take effect until after his death.—Craig v. Rupcke, Ill., 113 N. E. 928.

35. **Divorce**—Corroboration. —Uncorroborated testimony of petitioner for divorce, plus de-

fendant's uncorroborated confession, are insufficient to sustain a decree.—Garrett v. Garrett, N. J., 98 Atl. 848.

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76. **Religious Societies**—Joinder in Suit.—Two or more church societies of the Methodist Episcopal Church of America may be joined together with a single pastor as a circuit or otherwise and have one quarterly conference without changing the title of the church property or affecting the financial interests of the separate societies.—Buhrson v. Stoner, Ill., 113 N. E. 943.

77. **Sales**—Where defendant bought bricks from plaintiffs, contracting to pay in kind, no time for payment being specified, defendant's right to pay in kind was a privilege to be exercised within a reasonable time.—Nelson & Wallace v. Gibson, Vt., 98 Atl. 1006.

78. **Specific Performance**—Oral Agreement.—An oral agreement to convey land in consideration of support for life of grantor, not stating when the gift was to be made, or binding the owner of the land to remain and accept support, could not be specifically enforced.—Sandberg v. Clausen, Minn., 159 N. W. 752.

79. **Tenancy in Common**—Mere possession by one tenant in common, and payment of taxes and appropriation of the rents, gives no adverse title against co-tenants having no knowledge of adverse claim by him.—Mason v. Wingate, Ill., 113 N. E. 975.

80. **Theaters and Shows**—Ordinance.—An ordinance forbidding any person to exhibit in any building, without license, being in derogation of common law, is to be strictly construed in favor of the person against whom it is sought to be applied.—People ex rel. McShane v. Keller, N. Y., 161 N. Y. Supp. 132.

81. **Trusts**—Banks.—An unauthorized transfer by a trustee of a sum from the trust account in a bank to another person's individual account therein does not affect the ownership of such sum, nor create any indebtedness from the bank to such third person, and upon his retransfer, also unauthorized, of the same sum to the trust account, the bank is not liable to the third party.—Lowe v. Vermont Sav. Bank, Vt., 98 Atl. 1023.

82.——Nuptial Contract.—Betrothal and nuptial contract or certificate, entered into according to the Hebrew faith, whereby husband bound himself to contribute to the dower an amount equal to that brought in by the wife, secured by his present and after-acquired possession, held to create no trust in favor of wife.—Goldstein v. Goldstein, N. J., 98 Atl. 835.

83. **Vendor and Purchaser**—Constructive Notice.—The fact that the vendor of land is in possession does not impart constructive notice to a subsequent purchaser that he claims any rights to the land.—Trulin v. Plested, Iowa, 159 N. W. 633.

84.——Public Sale.—That land advertised as a tract of sixteen acres and sold at public sale was subject to railroad right of way, exclusive of which it contained less than sixteen acres, did not authorize purchaser familiar with land to refuse deed.—Keen v. Eaby, Pa., 98 Atl. 1040.

85.——Warranty Deed.—Grantee by warranty deed assuming payment of mortgage and informed by mortgagee as to notes covered thereby, before actual payment on the purchase price, though after he had given his note in part payment, was not a bona fide purchaser entitled to stand in any better position than mortgagor and grantor.—Lamoille County Sav. Bank & Trust Co. v. Belden, Vt., 98 Atl. 1002.

86. **Waters and Water Courses**—Riparian Owner.—The mere fact that a riparian owner whose lands may properly be irrigated from a stream conveys a right of way to a railroad does not cut off his riparian right, where the railroad embankment is cut and the stream permitted to flow through.—Half Moon Bay Land Co. v. Cowell, Cal., 160 Pac. 675.

87. **Wills**—Heirs.—When testator, after prior limitation makes, in present terms, a disposition in remainder to his heirs, such heirs, nothing else appearing, are to be determined as of time of testator's death.—Jenkins v. Lambeth, N. C., 90 S. E. 513.

88.——Life Estate.—Under will bequeathing all personal property to a brother of testatrix with provision for his support if it took all the property, and giving the balance at his death to her two daughters, held, that the brother took a life estate with remainder over to the daughters.—Morse v. Stoddard's Estate, Vt., 98 Atl. 991.

89.——Parol Evidence.—In construing testatrix's will, which left balance of estate to heirs of her late husband, who had a grandson, court could consider that testatrix had been accustomed to speak of husband's nephews and nieces as his heirs, as tending to prove what "heirs" meant to her.—Jones v. Bennett, N. H., 99 Atl. 18.

90.——Testamentary Capacity.—If the testator understands the effect of the will as a whole he need not grasp the meaning of technical legal terms or anticipate what legal construction would be adopted if the will came before the courts.—Dunham v. Holmes, Mass., 113 N. E. 845.

91.——Undue Influence.—In will contest, testimony of witness that from his experience and observation deceased was entirely under domination of Christian Scientist people, who were the principal beneficiaries, was competent on issue of undue influence.—In re Staub's Will, N. C., 90 S. E. 119.

92.——Void Bequest.—Where a will makes an absolute gift, a direction to withhold payment until the legatee is likely to make proper use of the money is contrary to public policy and void.—In re Schwartz's Estate, Pa., 98 Atl. 780.

93. **Witnesses**—Bias and Prejudice.—Evidence of a meeting of state's witnesses to organize a mob to hang defendant is admissible to show bias and prejudice of the witnesses.—State v. Pruett, N. M., 160 Pac. 362.

94.——Competency.—Under Kirby's Digest, § 3092, prosecutrix in a trial for carnal knowledge of female under 16, who after the indictment was found, and before the trial had commenced, had married the defendant, was not incompetent to testify against him.—Wilson v. State, Ark., 188 S. W. 554.

95.——Competency.—The payment of amounts due by defendant to decedent constituted transactions as to which defendant could not testify.—Goldsworthy v. Oliver, Wash., 160 Pac. 4.

96.——Cross-Examination.—Permitting cross-examination of witness for plaintiff to show that he had borrowed money from a defendant and had not yet paid it back was within discretion of court.—Fitzgerald v. Young, Mass., 113 N. E. 777.

97.——Cross-Examination.—A party is entitled to find out the full interest of a witness who testifies against him, and all the circumstances calculated to create bias, prejudice, or zeal, on the part of such witness may be inquired into.—Raymond v. Rutland Ry. Light & Power Co., Vt., 98 Atl. 909.

98.——Examination.—In an action for damages caused by fire alleged to have been caused by defendant's locomotive, question asked a witness whether or not the locomotive when in operation across the land in question, emitted any sparks of fire, and to what extent, was not objectionable in form.—Meares v. Wynnewood Lumber Co., N. C., 90 S. E. 190.

99.——Waiver.—Though, under Rev. St. c. 84, § 112, rendering inadmissible testimony of husband or wife for the other where an administrator is a party, testimony of plaintiff's wife would have been inadmissible if seasonably objected to, defendant administrator waived objection by stipulating that her deposition should be used on trial and in any resulting appeal.—Haslam v. Perry, Me., 98 Atl. 812.

100.——Waiver.—In an action to have conveyances declared to be advancements, in which the administrator was joined as a defendant, merely as a nominal party, to enable the court to direct as to distribution, the administrator by calling as a witness one who was incompetent under Code, § 4604, did not waive the prohibition of the statute; the testimony being inadmissible as against the real parties in interest.—Calhoun v. Taylor, Iowa, 159 N. W. 600.